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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR., and ANTHONY P. NUGENT, JR.,
Petitioners,

vs.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Age Discrimination in Employment Act (ADEA) definition of "employee," 29 U.S.C. § 630(f), which exempts "appointee[s] on the policy making level," include under its coverage Missouri state-court judges?

2. Does a state constitutional provision mandating the retirement of its judges at age 70 rationally further a legitimate state purpose?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, John D. Ashcroft, Governor of the State of Missouri, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 898 F.2d 598 (1990), and is reproduced at pages A-1 through A-16 of the Petition.

STATEMENT OF FACTS

As relevant herein, this legal proceeding was initiated by a supplemental and amended complaint filed on behalf of the Honorable Ellis Gregory, Jr., the Honorable Anthony P. Nugent, Jr., the Honorable Douglas W. Greene, and the

Honorable Flake L. McHaney.* The plaintiffs based their claims for relief upon the Age Discrimination in Employment Act of 1967 (hereafter "ADEA"), 29 U.S.C. §§ 621-634, as amended by Public Law 99-592, and upon the Fourteenth Amendment to the United States Constitution. The plaintiffs alleged that Article V, § 26, of the Missouri Constitution, which provides, in part, that "[a]ll judges other than municipal judges shall retire at the age of seventy years . . . under a retirement plan provided by law . . .," is in violation of the ADEA and the Fourteenth Amendment. The retirement provision of the Missouri Constitution is reprinted in the petition at page 3.

The defendant, the Honorable John D. Ashcroft, present Governor of the State of Missouri, moved to dismiss the complaint of plaintiffs. The Governor alleged that the Fourteenth Amendment does not apply to issues of age, or that, in the alternative, that the State of Missouri has a rational basis for requiring judges to retire at the age of seventy, and that plaintiffs failed to state a cause of action under the ADEA because plaintiffs are not employees covered by the ADEA.

In the majority of jurisdictions within the State of Missouri, circuit and associate circuit judges are selected by a vote of the people. The elections are partisan and political. With respect to specified jurisdictions and courts, some judges are appointed by the Governor (Art. V, § 25(a)), with the caveat that people do vote on whether to retain such judges in office (§ 25(c)(1)(2)). Petition, pages 4 and A-27. The constitutional provisions herein referred to constitute what is known as the Missouri Non-Partisan Court Plan (NPCP). Its provisions apply to the appellate courts of the State of Missouri and to the circuit courts in the St. Louis and Kansas City metropolitan areas.

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* Judges Gregory and Nugent filed the petition for certiorari. Judges Greene and McHaney did not join.

Three of the original plaintiff judges serve as a result of the processes outlined under the Non-Partisan Court Plan. Judge McHaney was initially appointed, and thereafter has been elected and reelected, to serve a district not covered by the NPCP. The petitioners do not allege that judges elected to office by the people are "employee[s]" under the ADEA.

The Missouri Constitution does not disqualify state court judges from acting in a judicial capacity after attaining the age of seventy.

> Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the Supreme Court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge, he shall have the same powers as an active judge.

Art. V., § 26.3, Petition, page 3.

Section 476.682, RSMo Supp. 1988, provides a mechanism whereby persons who serve as judges, pursuant to the constitutional provision cited *supra*, after the age of seventy will receive compensation at the same annual rate as judges under seventy.

Judges covered by the Missouri NPCP are subject to elections. Art. V, § 25(c)(1), Petition, page A-27. After a defined term, such a judge is required to file in the Office of the Secretary of State of Missouri a declaration of candidacy for election to succeed himself if he desires to retain his judicial office. If such a declaration is filed, the question of whether to retain said judge is determined by a majority vote of the people at the next general election.

The EEOC has taken the position that a state judge "who is appointed by the Governor or the legislature and must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.' " EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, reprinted in EEOC

Compliance Man. (BNA) at N:1001, n. 2. The Governor raised this issue in the district court in his motion to dismiss. The district court rejected this argument. Petition, page A-20, f.n. 3. The Eighth Circuit did not reach it. Petition, page A-5.

The parties agree that the State of Missouri is an "employer" within the definition of Title 29 U.S.C. § 630(d).

The district court granted the defendant's motion to dismiss. Petition, pages A-17 to A-26. The lower court dismissed Count I of the plaintiff judges' supplemental complaint (the ADEA count) on the basis that Judges Gregory, Nugent, and Greene were excluded from the ADEA definition of "employee" because they are "appointee[s] on the policy making level." The district court dismissed Count II of the plaintiff judges' supplemental complaint (the Fourteenth Amendment count), because it found that Missouri had a rational basis for the enactment of its constitutional provision respecting the retirement of state court judges, as represented by the Missouri Supreme Court case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978).

The United States Court of Appeals for the Eighth Circuit affirmed. 898 F.2d 598 (8th Cir. 1990), Petition, pages A-1 to A-16. The Eighth Circuit first noted that the tenure of state court judges "is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." Petition, at page A-4. Because the application of the ADEA to state court judges is of such consequence and import, the Eighth Circuit determined that it would not find the ADEA to be in conflict with Missouri's constitutional provision mandating the retirement of state court judges unless it found that "Congress clearly has expressed its intention to bring state court judges into the ambit of the federal statute." Petition, at page A-4. The Eighth Circuit failed to find an intent by Congress to preempt, via the ADEA, state law pertaining to the retirement of judges. To the contrary, the Eighth Circuit found the plain language of 29 U.S.C. § 630(f), which exempts "appointee[s] on

the policy making level," as evidencing a clear-cut congressional intent to exclude state court judges, who do make policy, from the coverage of the Act. Petition, at pages A-6 to A-7. We quote:

> Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges must exercise the same sort of discretion in decision making, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policy making level" in the executive and legislative branches.

The Eighth Circuit did not find applicable legislative history to suggest a contrary result. Petition, at pages A-8 to A-9.

The Eighth Circuit noted that, in Missouri, some state court judges are appointed by the Governor, and subjected to election for retention by the people, and some state court judges are elected by popular vote. The irrationality of treating those judges initially appointed by the Governor as covered, under the ADEA, and treating judges initially elected by popular vote as exempted is obvious.

> In Missouri, where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA as "appointee[s] on the policy making level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected judges for purposes of the ADEA.

Petition, at pages A-10 to A-11. Again:

> Thus an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed.

Petition, at page A-10.

The Eighth Circuit also rejected the petitioners' contention that Missouri's constitutional provision pertaining to the retirement of judges was in violation of the equal protection clause of the Fourteenth Amendment. The Eighth Circuit found that the rational basis test was correctly applied by the district court. Petition, at pages A-13 to A-14. Further, the lower court found that the Missouri Supreme Court had articulated sufficiently rational bases for the mandatory retirement provision in the case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978). Those rational bases include (1) the societal interest in a judicial system of the highest caliber which justifies the drawing of a line at an age at which there is often a lessening in mental and physical abilities; (2) the advantages of an objective line "to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not"; (3) the increase in opportunities to enter the judiciary for qualified younger persons with fresh ideas and techniques; (4) the interest in assuring "predictability and ease in establishing and administering judges' pension plans." Petition, at page A-15. The Eighth Circuit went on to find that the rational bases articulated by the Missouri Supreme Court were consistent with decisions on the same issue from other jurisdictions. In short, the Eighth Circuit found that a state mandatory retirement provision for its judges is not without a rational basis.

REASONS WHY THE PETITION SHOULD BE DENIED

The petitioners posit two reasons why the Court should grant their writ. First, they assert, correctly, that a conflict exists among the circuits on the issue of whether appointed state court judges are exempted from coverage under the ADEA. The court below and the First Circuit found that state court judges, like the petitioners, are "appointee[s] on the policy making level," and thereby exempted under 29 U.S.C. § 630(f). *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988). The Second Circuit found that appointed state court judges are not exempted from coverage under the ADEA. *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990). Second, petitioners assert, incorrectly, that that portion of the opinion below pertaining to the equal protection issue, i.e., whether a state has a rational basis for providing for the retirement of its judges, is in conflict with decisions of this Court.

The respondent submits that this is an inappropriate case in which to grant a writ because (1) despite the existence of a conflict among the circuits, the decisions of the Eighth and First Circuits are correct on the merits and need not be reviewed; (2) there exists an independent basis in support of the opinion of the Eighth Circuit which makes this case unique from other court decisions on the ADEA issue, in that, in Missouri, judges like the petitioners are persons "elected to public office" (29 U.S.C. § 630(f); and (3) there is no conflict in decisions or in principle which justifies a review of the lower court's decision respecting the existence of a rational basis for retiring state court judges.

I.

ALTHOUGH A CONFLICT EXISTS BETWEEN DECISIONS OF THE EIGHTH AND FIRST CIRCUITS AND THE DECISION OF THE SECOND CIRCUIT PERTAINING TO THE EXEMPT STATUS OF APPOINTED STATE COURT JUDGES UNDER THE ADEA, THE WRIT SHOULD BE DENIED IN THIS CASE BECAUSE THE DECISIONS OF THE EIGHTH AND FIRST CIRCUITS ARE CORRECT ON THE MERITS.

The most important issue before the Court relates to the ADEA definition of "employee" set out in 29 U.S.C. § 630(f) (emphasis added):

> The term "employee" means an individual employed by any employer *except that* the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policy making level*, or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Both the Eighth Circuit, to which the petition is directed in this case, and the First Circuit have decided that the exemption language quoted above applies to appointed state court judges, and that, therefore, the proscriptions on age discrimination included within the ADEA are inapplicable. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988). In accord, see *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *In re Stout*, 521 Pa. 571, 559 A.2d 489 (1989); and *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 517 N.E.2d 141 (1988). The decisions of the Eighth and First Circuits are correct, on the merits and as a matter of law, so that Supreme Court review of the positions taken in those cases is unnecessary.

The Eighth Circuit first noted the importance to a state of determining the tenure and qualifications of its judges.

> Because, however, the tenure of state court judges is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate, we will examine the ADEA to determine whether Congress explicitly and unequivocally manifested an intent to preempt state law in this area.

Petition, at page A-4. The Eighth Circuit did not believe that Congress could have intended to preempt the traditional state prerogative with respect to the tenure of its judges without a clear and unequivocal expression of such an intent. The Eighth Circuit then turned to the language of the subject exemption itself, i.e., are appointed state court judges "appointee[s] on the policy making level." That court found that judges are policy makers.

> The reality of judging is that it is not always — and perhaps not even usually — merely a matter of mechanically applying settled, unambiguous principles of law to specific fact patterns as they arise. . . . In keeping with our common law tradition, judges in deciding the particular cases before them may establish either general standards or specific rules of decision that may be relied upon in the future by other judges, by other branches of government, by attorneys and other professionals in advising their clients, and by members of the public in planning their affairs, either individually or in organizations of every kind. Whatever the judicial philosophy of the particular judge, and whether he views his proper role as broad or narrow, his decisions — some of them at least — necessarily will involve issues previously unsettled and thus will create law. Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges

> must exercise the same sort of discretion in decision making, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policy making level" in the executive and legislative branches.

Petition, at pages A-6 to A-7. In addition, the Eighth Circuit found that Missouri's appointed judges exercise policy making responsibility with respect to supervision of the Missouri court system. Petition, at page A-7.

The Eighth Circuit also disposed of the contention that the whole text of 29 U.S.C. § 630(f) suggests an intended application primarily to the executive and legislative branches of government.

> If the policy making level exception is read in this limited manner, none of the four categories of exemptions from the coverage of the ADEA would apply to employees in the judicial branch in those states where judges are appointed. We believe it is highly unlikely that the Congress intended this result, and the implausibility of the total exclusion of the appointed members of the state judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, weighs heavily against such a narrow reading of the policy making level exception.

Petition, at page A-8. The lower court found that such legislative history as is available and pertinent does not suggest a contrary intent of Congress. Petition, at page A-9. The Eighth Circuit also addressed the absurdity of the result proposed by the petitioners.

> Thus, an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA, while the highest ranking judges in Missouri would be covered by the Act simply because they are

> appointed. We conclude that Congress's designation of "appointee[s] on the policy making level" as an exemption to the ADEA definition of "employee" manifests an interest in excluding persons entrusted with extensive decision making authority and discretionary power from the protection of the Act. There is no rational basis for deeming this interest to be more compelling in the executive and legislative branches than in the judiciary, and we refuse to embrace such an inconsistent position. . . .
>
> In Missouri, where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA as "appointee[s] on the policy making level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected judges for purposes of the ADEA.

Petition, at pages A-10 to A-11.

The force and logic of the Eighth Circuit Opinion in this case suggests that this is not the proper case in which to grant a writ to resolve this issue.

The decision of the First Circuit on this issue is equally compelling. We quote:

> If appointed judges fit under any exception, it is the third one: "An appointee on the policy making level." Certainly the judges under consideration are appointees. Just as surely they can be said to be "on the policy making level." While judges have at times been thought to act as somewhat mechanized law-and-fact processors, scientifically applying settled principles of law to established fact patterns, that image hardly meshes with the reality of judging. The trial judge in this case, in fact, provides us with an apt description of the kinds of decisions that members of the bench are called upon to make:

> It is nevertheless clear that "policy making" is indisputably a part of the function of judging to the extent that judging involves law making to fill the interstices of authority found in constitutions, statutes, and precedents (a function more predominant in appellate judging than in the performance of trial judges who are of course the group whose interest plaintiff EEOC seeks to protect in this litigation). Moreover, the substantive interests identified by the phrase "on the policy making level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those judges within the judicial branch who serve as judges (including trial judges).

EEOC v. Commonwealth of Massachusetts, 680 F. Supp. 455, 462 (D. Mass. 1988).

> This judicial type of policy making is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decision making, and the same kind of forward thinking that is required of "apointee[s] on the policy making level" in those other two branches of government. And it certainly concerns state government to a similar degree.

EEOC v. Massachusetts, supra, at 54-55.

It is the decision of the Second Circuit which should be reviewed by this Court. *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990). That circuit concluded that the policy maker exemption applied only to appointees working closely with the elected officials who appointed them. *Id.* at 798. This reasoning disqualifies the judicial branch of government in any state from being exempted under the ADEA. As is true with the federal government, the State of Missouri provides for three independent branches of government, of which the judiciary is a

coequal branch. To perform its function, the judiciary must be independent. That is, a state court judge cannot work closely with the Governor who appointed him if the judiciary is to remain an independent branch of government. Apparently, the Second Circuit believes only bureaucrats make policy. To the contrary, in Missouri, at least, judges are among the most powerful framers of public policy. It is nonsensical to conclude that Congress intended only to exempt executive and legislative policy makers from coverage under the ADEA. Yet more surprising was the conclusion by the Second Circuit that judges are not policy makers!

> Though such a judicial decision may thus state or clarify a policy, any such statement or clarification is merely ancillary to the resolution of a particular controversy between parties.

Id. at 800-801. It is perplexing to understand how a judge can state or clarify policy without making policy. If a writ should be granted to the end that the Supreme Court can review the issue here presented, it is at the Second Circuit to which such a writ should be directed.

II.

THERE EXISTS AN INDEPENDENT BASIS FOR EXEMPTING PETITIONERS FROM COVERAGE UNDER THE ADEA WHICH WOULD MAKE THE GRANTING OF THE WRIT IMPROVIDENT.

Twenty-nine U.S.C. § 630(f) also exempts from the statutory ADEA definition of "employee" "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof . . . ." The district court determined that the "elected to public office" exemption did not apply to judges appointed and retained under the Missouri Non-Partisan Court Plan. Petition, p. A-20, f.n. 3. The Eighth Circuit was inclined to disagree with that conclusion but did not reach it. Petition, p. A-5.

In Missouri, the judges of the state Supreme Court, the state courts of appeals, and the circuit and associate circuit benches in Kansas City and metropolitan St. Louis are initially appointed by the Governor. Art. V, § 25(a), Const. of Mo. (1945); Petition, p. 4. This initial appointment is for a specified term. The judge of a court so specified, who wants to retain his office as a judge, must file in the office of the state Secretary of State "a declaration of candidacy for election to succeed himself." If the declaration is filed, the name of that judge is submitted at the next general election, where eligible voters determine whether or not to retain him. Art. V, § 25(c)(1); Petition, p. A-27.

The EEOC has taken an official position contrary to that reached by the district court in this case. The official position of the Commission is that:

> [A] state or local judge who is elected by the general electorate or who is appointed by the Governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term "employee" under the ADEA as a "person elected to public office."

EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, reprinted in EEOC Compliance Man. (BNA) at N:001, n. 2.

If the petitioners are persons elected to public office, then the question raised in the petition is not dispositive of the existing dispute between the parties and should not be reached. The peculiarities of the Missouri Non-Partisan Court Plan make this case unique among all the decisions relating to the "appointee on the policy making level" issue.

III.

THAT PORTION OF THE EIGHTH CIRCUIT OPINION PERTAINING TO PETITIONER'S EQUAL PROTECTION CHALLENGE OF MISSOURI'S MANDATORY RETIRE MENT PROVISION FOR STATE COURT JUDGES IS NOT IN CONFLICT WITH THE DECISIONS OF THIS OR ANY OTHER COURT.

In their second Question Presented, the petitioners make the total misrepresentation that the equal protection analysis portion of the opinion below is in conflict with this Court's precedents. In fact, as noted by the Eighth Circuit, there is no decision from any court on point which would support the petitioners' position.

> All four of the judges contend that the Missouri mandatory retirement provision for state court judges violates the equal protection clause of the Fourteenth Amendment. We do not agree and note that we are unable to find even a single case wherein a state mandatory retirement provision has been invalidated under the Fourteenth Amendment.

Petition, P. A-13.

Not only is there no conflict in decisions, there is no conflict in principle between the opinion of the Eighth Circuit and existing precedent of this Court. Petitioners cite the Court only to *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Unfortunately for petitioners, *Murgia* held that old age is not a suspect class and there is no fundamental right to government employment. *Id.* at 313. In that case, this Court found specifically that a mandatory retirement age statute for state police officers did not call for a strict scrutiny analysis, i.e., heightened level of analysis should not be applied to state laws

or policies related to age because they do not impermissibly interfere with the exercise of a funadmental right or operate to the peculiar disadvantage of a suspect class.

Cleburne is equally unsupportive of the petitioners' position.

> [T]he lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne, supra, at 441-442.

The petitioners assert that the district court should have given them an evidentiary hearing on the issue of the existence of a rational basis for Missouri's mandatory retirement provision for state court judges. Petition, page 15. However, an evidentiary hearing is not required before the rational basis test may be applied. In *Pennell v. City of San Jose*, 481 U.S. 1 (1988), a case decided after *Cleburne* and *Murgia*, the record before the Supreme Court consisted of a judgment on the pleadings. No evidence was adduced. This Court held that the ordinance at issue violated neither the due process nor equal protection clauses of the Fourteenth Amendment.

> As we stated in *Vance v. Bradley*, 440 U.S. 93, 99 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Id. at 14. The rational basis test is highly deferential to state laws and regulations. That portion of the Eighth Circuit's opinion finding that Missouri had a rational basis for retiring its state court judges at age 70 is not in conflict with any precedent from this Court, nor that of any other court. Therefore, the petition should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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